ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
TELEPHONE COMPANY-CABLE TELEVISION Cross-Ownership Rules, Sections 63.54-63.58	)	CC Docket No. 87-266
	)	
and	)	
	)	
Amendments to Parts 32, 36, 61, 64, and 69 of the Commission's Rules to Establish and Implement Regulatory Procedures for Video Dialtone Service	)	RM-8221

COMMENTS OF THE NATIONAL CABLE TELEVISION ASSOCIATION, INC.

Howard J. Symons
Christopher J. Harvie
Tara M. Corvo
Mintz, Levin, Cohn, Ferris,
Glovsky and Popeo, P.C.
701 Pennsylvania Ave., N.W.
Washington, D.C. 20004
202/434-7300

Daniel L. Brenner
Neal M. Goldberg
David L. Nicoll
1724 Massachusetts Ave., N.W.
Washington, D.C. 20036
202/775-3664

Its Attorneys

December 16, 1994

TABLE OF CONTENTS

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
TELEPHONE COMPANY-CABLE TELEVISION Cross-Ownership Rules, Sections 63.54-63.58	)	CC Docket No. 87-266
	)	
and	)	
	)	
Amendments to Parts 32, 36, 61, 64, and 69 of the Commission's Rules to Establish and Implement Regulatory Procedures for Video Dialtone Service	)	RM-8221

COMMENTS OF
THE NATIONAL CABLE TELEVISION ASSOCIATION, INC.

The National Cable Television Association, Inc. ("NCTA"), by its attorneys, hereby files these comments in response to the Commission's Third Notice of Proposed Rulemaking[1/] in the above-captioned proceeding.

INTRODUCTION AND SUMMARY

Cable programmers have transformed the television landscape by offering a rich variety of new and diverse services that were previously unknown and unavailable to consumers. Channels such as HBO, Showtime, C-Span, CNN, American Movie Classics, The Discovery

---

1/ Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, CC Docket No. 87-266, Memorandum Opinion and Order on Reconsideration and Third Further Notice of Proposed Rulemaking (Nov. 7, 1994) ("Reconsideration Order" or "Third Notice").

Channel, The Disney Channel, Comedy Central, Arts and Entertainment Network, MTV and an array of others developed by cable entrepreneurs have fundamentally changed public expectations regarding video entertainment and information programming. The promise of the Commission's video dialtone policy framework is that these entrepreneurs -- and others eager to enter the market -- will have a fair and equal opportunity to compete for capacity and channel positioning on the video platforms to be offered by local exchange carriers. The Commission's duty in this proceeding is to ensure that the implementation of video dialtone fulfills that promise of equal and nondiscriminatory access for all programmers.

Video dialtone is a programming distribution mechanism "based for the first time on nondiscriminatory video common carriage made available to and supporting multiple programmers."[2/] By requiring local exchange carriers ("LECs") to "make available to all service providers the same service offerings and functionalities on the same terms and conditions,"[3/] the Commission sought to ensure that no programmer or group of programmers would receive special treatment on the video dialtone system.

In the Third Notice, the Commission has sought comment on a number of proposals designed to respond to possible shortfalls of analog capacity in the offering of video dialtone service to programmer-customers by telcos. As a threshold matter, the video dialtone policy framework obligates the Commission to prevent the creation of artificial scarcity and the

---

2/ Telephone Company - Cable Television Cross-Ownership Rules, Sections 63.54-63.58, CC Docket No. 87-266, Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking, 7 FCC Rcd 5781, 5787 (1992), pets. for review pending sub nom. Mankato Citizens Tel. Co. v. FCC, No. 92-1404 et al. (D.C. Cir. Sept. 9, 1992)("Video Dialtone Order").

3/ Id. at 5810-11.

resulting potential for discrimination against programmers. In instances where the demand for analog capacity exceeds supply, fairness and competitive equity among programmers dictate that capacity should be allocated among all programmer-customers in a wholly non-discriminatory and scrupulously fair manner.

Non-discriminatory measures designed to enhance the efficient use of the video platform are not inconsistent with the Commission's video dialtone policy framework. Thus, channel sharing arrangements forged among programmer-customers themselves should be permitted. Direct or indirect telco participation in the development or management of such arrangements, however, would impermissibly involve telcos in the selection, bundling, tiering and provision of video programming to subscribers. Any such arrangements must be prohibited.

Nor should the Commission countenance preferential access to the video platform for particular programmers or classes of programmer. There are any number of cable satellite networks -- such as C-Span, The Learning Channel, and The History Channel -- that are as entitled as educational access channels to such access and are no less deserving of preferential treatment than any commercial broadcast station. Commission-mandated preferential access proposals would violate the First Amendment rights of disfavored programmers, since there is no content-neutral basis for such measures and absolutely no empirical record suggesting the need for preferences.

Likewise, the "will-carry" proposal advanced by Bell Atlantic would favor commercial broadcasters at the expense of cable programmers. Permitting telcos to award special treatment to certain program providers would transform video dialtone into cable service, undermining the

non-discriminatory access requirement that is fundamental to video dialtone and breaching the content-conduit distinction at the heart of any common carrier offering.

The goal of developing a nationwide advanced telecommunications infrastructure is ill-served by rules that prevent cable entrepreneurs from using capital and assets in the most economic and profit-maximizing manner. Cable operators -- like all other competitive providers of telecommunications services -- should not be restricted from redeploying capital away from markets where the continued provision of service is unprofitable or economically infeasible. Accordingly, there is no justification for any rules restricting telco acquisition of in-region cable facilities. Existing antitrust laws are designed to address the precise competitive issues prompting Commission consideration of such rules, yet they also are flexible enough to permit telco acquisitions of in-region cable facilities that make economic sense.

At a minimum, the Commission's limitation on buyouts must be tailored to permit telco acquisition of in-region cable facilities in markets where two-wire competition is unsustainable. The available evidence suggests that a rule permitting such acquisitions in markets below 50,000 inhabitants is necessary.

Finally, the preservation of a competitive video programming services market requires the Commission to adopt new rules and safeguards designed to prevent telephone companies now entering the video distribution market from leveraging their control over poles and conduits in an anti-competitive or discriminatory manner. Specifically, the Commission should require telcos to impute a portion of the cost of poles and conduits to their video dialtone service, and charges for video dialtone should reflect this imputed cost.

I. CAPACITY ISSUES MAY NOT ERODE OR UNDERMINE THE HALLMARK PRINCIPLE OF NONDISCRIMINATION UNDERLYING THE COMMISSION'S VIDEO DIALTONE POLICY

The Commission's video dialtone policy framework requires telcos to provide service "indifferently" to all would-be programmer-customers.[4/] Consistent with that framework, the Commission has barred telcos from editing, selecting, bundling or packaging programming to be transmitted over their video dialtone networks.[5/] Telcos offering video dialtone service "are very different from traditional cable operators in that they are foreclosed from engaging in activities that cable operators describe as central to their role" as providers of video programming services.[6/] Solely for this reason, video dialtone providers are not subject to Title VI of the Communications Act.[7/] In short, nondiscriminatory access constitutes the bedrock principle underlying the Commission's video dialtone policy. Proposals or practices that erode

---

4/ National Cable Tel. Ass'n, Inc. v. FCC, 33 F.3d 66, 75 (D.C. Cir. 1994) ("NCTA v. FCC").

5/ See Video Dialtone Order at 5817:

> In our amended rule section, we are very broadly proscribing telephone company activities that could be construed as their engaging in selection of video programming as traditional cable operators. Cable operators select video programming by making decisions concerning the price of video program offerings and by bundling, packaging, and creating tiers of video programming that affect the availability of video programming to consumers. In contrast to local telephone companies offering video dialtone, cable operators are able to select video programming by owning, exercising editorial control over, or having cognizable financial interests in, video programming.

Id. (emphasis added).

6/ Id. at 5818.

7/ See NCTA v. FCC, 33 F.3d at 75.

the principle of nondiscrimination concomitantly erode the basis for holding video dialtone service to be outside the scope of Title VI.

As the Commission has recognized, the most effective means of assuring the primacy of this nondiscrimination principle is the requirement that video dialtone platforms be "expand[ed] as demand increases so as not to become a bottleneck that will thwart realization of our public interest goals."[8/] With each and every video dialtone authorization, the Commission has repeatedly and steadfastly affirmed this principle.[9/]

The ability to have supply consistently meet demand is the essence of the video dialtone policy, since any shortfall of capacity requires allocation measures that, if implemented via telephone company involvement, will involve them in the provision of cable service. Thus, the expandability requirement protects against discrimination among programmers, since the avoidance of capacity shortfalls prevents the LECs from becoming involved, directly or

---

8/ Video Dialtone Order, 7 FCC Rcd at 5797-98.

9/ See New Jersey Bell Tel. Co., 9 FCC Rcd 3677, 3680 (1994) ("A video dialtone service must offer nondiscriminatory access to multiple programmers, and its capacity must be able to expand to accommodate increasing demand so as not to become a bottleneck"); The Chesapeake and Potomac Tel. Co. of Virginia, 8 FCC Rcd 2313, 2515 (1993)(noting that "the capacity of the basic platform to accommodate video programmers is unlimited" and can thus "accommodate any video programmer that desires to connects its own video server to the video dialtone platform"); New York Tel. Co., 8 FCC Rcd 4325, 4328 (1993)(conditioned authorization on NYNEX's "ability and willingness to undertake reasonable expansion of capacity as necessary"); The Southern New England Tel. Co., 9 FCC Rcd 1019, 1021-22 n. 46 (confirmed that SNET "will expand the initial capacity of the platform if necessary to meet increased demand" and described policy that the Commission would review each video dialtone application on a case-by-case basis, taking into consideration, among other things, the ability to expand capacity); Rochester Tel. Corp., 9 FCC Rcd 2285, 2286 (1994) ("The platform must . . . provide 'sufficient capacity to serve multiple video programmers'").

indirectly, in channel allocation decisions. As the Commission stated in the Reconsideration Order:

> This requirement, we believe, compounds the benefits of video dialtone by ensuring greater diversity in the sources of video programming and fostering infrastructure development....[T]he expandability of video dialtone systems is a critical factor in reducing the ability of LECs to discriminate in their provision of video dialtone service. Specifically, it precludes LECs from limiting capacity or avoiding further investment in their video dialtone systems in order to insulate certain video programmers from competition.[10/]

Notwithstanding the critical importance of the expandability requirement, the Commission observed in the Third Notice that the Section 214 application process has revealed that "there may be technical limits on the expandability of analog capacity in video dialtone systems."[11/] Accordingly, it has sought comment on a number of LEC proposals designed to accommodate capacity shortfall scenarios. Because such measures are proffered in lieu of the simple expedient of expanding capacity, it is incumbent upon the Commission to ensure that they do not provide the LECs with the means to circumvent the bedrock requirement of nondiscrimination. To date, the proposals offered by the LECs for addressing capacity shortfall scenarios are rife with discriminatory potential.

The now discredited "anchor programmer" proposals advanced by some LECs provide the most glaring example of how measures aimed at responding to capacity shortfall issues can thwart the Commission's objectives for video dialtone.[12/] The essence of the proposals would

---

[10/] Reconsideration Order at ¶ 36.

[11/] Third Notice at ¶ 268.

[12/] See, e.g., Letter of July 7, 1994 to Honorable Reed E. Hundt from William F. Reddersen, BellSouth Corp., File No. 6977; Lee G. Camp, Pacific Bell, File Nos. 6913, 6914, 6915 and 6916; Thomas M. Barry, Southwestern Bell Corp.; and Robert C. Calafel, GTE Corp, File Nos. 6955, 6956, 6957 and 6958 ("Joint LEC Anchor Programmer Letter).

permit a single programmer-customer affiliated with or selected by the LEC to obtain channel capacity to establish a tier of broadcast and satellite-delivered programming.

As the Commission itself concluded, permitting a single entity selected by the LEC to obtain preferential access to a substantial block of analog channels fundamentally clashes with the common carrier framework underlying video dialtone.[13/] Where a telephone company holds an ownership or financial interest in such a programmer, the likelihood of preferential allocation of channels and other anti-competitive abuses is a near-certainty.[14/] Even without a formal ownership interest in such an entity, a telephone company would have an obvious interest in assigning the anchor programmer a disproportionate share of analog capacity and preferred channel locations to enhance its viability.[15/] Inevitably, other programmer-customers would suffer from inferior access to the platform, second-rate channel assignment and other discriminatory treatment. In short, the anchor programmer proposals flatly contravened the Commission's proscription against permitting telcos to "select video programming by determining how programming is presented for sale to consumers."[16/]

The Commission's decision to reject these proposals was dictated by the video dialtone framework and principles that it established. The telcos, however, are seeking to revive the

---

13/ Reconsideration Order at ¶ 35.

14/ The interest need not be a straight equity interest. For example, Pacific Bell obtained a conditional option to purchase its proposed anchor programmer in the event that regulatory constraints on such ownership are removed. "Pacific Bell signs first video programmer," Connections, August 1, 1994. The incentives for favorable treatment engendered by such a relationship are self-evident.

15/ See Joint LEC Anchor Programmer Letter ("The best hope for strong competition with entrenched cable companies lies with 'anchor programmers.'").

16/ Video Dialtone Order, 7 FCC Rcd at 5789.

substance, though not the form, of the anchor programmer concept under the guise of developing proposals to address capacity shortfalls. Because these proposals are replete with potential for discriminatory treatment and preferential advantages for LEC-friendly entities, they must be scrutinized closely to prevent the discriminatory perils inhering in the anchor programmer concept from resurrecting themselves under a different guise. Absent such scrutiny, the Commission runs the risk of engendering a plethora of self-induced capacity shortfalls by the LECs.

A. THE COMMISSION SHOULD CLOSELY SCRUTINIZE ANALOG CAPACITY SHORTFALL CLAIMS PROFFERED BY TELEPHONE COMPANIES AND ENSURE THAT SCARCE ANALOG CAPACITY IS ALLOCATED IN A WHOLLY NONDISCRIMINATORY MANNER

The Third Notice seeks comment on mechanisms for addressing issues that arise as a result of shortfalls in analog channel capacity.[17/] As a threshold matter, the Commission's policy must be grounded in the realization that analog and digital are not like services. As the Commission has acknowledged, the near-term commercial and technical viability of digital and analog distribution are not functionally equivalent.[18/] Some programmer-customers required to deliver their signal digitally may face technical and marketing barriers.[19/] Similarly, while digital delivery will make available to end users an array of new services that go well beyond

---

17/ Third Notice at ¶ 271.

18/ See, e.g., Third Notice at ¶ 268; "Bell Programmer Warns Video-On-Demand Is Years Away," Multichannel News, November 7, 1994 at 30 (reporting that a Bell affiliated digital set-top developer believes it "will take at least five years before movies are delivered electronically....").

19/ See, e.g., Bell Atlantic Application W-P-C 6966, filed June 16, 1994 at 14 (noting that digitization may not be cost-effective for all programmers and that "[c]onversion to digital signal delivery will not happen overnight" and "requires capital investment by programmers").

traditional video programming distribution, subscribers also will be required to obtain new equipment in order to gain access to digital services.[20] Thus, under standard principles of common carriage, the present lack of functional equivalency between analog and digital distribution prevents them from being considered as "like services."[21]

Price considerations also may play an important role in determining the near-term commercial viability of digital programming services. The Commission has estimated that digital set-top converters may cost end-users approximately $300.[22] These price considerations may delay consumer adaptation to -- and acceptance of -- digital programming services.

These temporary differences between analog and digital capacity demonstrate that the Commission's video dialtone objectives will be thwarted unless all programmer-customers are granted equal and nondiscriminatory access to analog channel capacity. While such differences are expected to narrow in the future, short-term considerations are critical because of the significant cost, technical and marketing benefits that will accrue to programmer-customers occupying analog channels at the time of a system's launch. The telephone company's provision of service is not "indifferent" where one or several providers of video programming are afforded

---

[20] Third Notice at ¶ 268.

[21] Competitive Telecommunications Ass'n v. FCC, 998 F.2d 1058, 1061 (D.C. Cir. 1993) (likeness...depends upon 'functional equivalence'"); Ad Hoc Telecommunications Users Comm. v. FCC, 680 F.2d 790, 795 (D.C. Cir. 1982) (likeness issue "focuses on whether the services in question are 'different in any material functional aspect.'"); American Broadcasting Cos., Inc. v. FCC, 663 F.2d 133, 139 (D.C. Cir. 1980)("The test looks to the nature of the services offered to determine likeness; the perspective of the customer faced with differing services is often considered a significant factor.").

[22] Third Notice at ¶ 268.

a "head start" over their competitors.[23] The twin objectives of diversity and nondiscrimination will be undermined if some programmers are denied a full and fair opportunity to compete for analog capacity prior to the offering of video dialtone service.

Telephone company proposals to, in effect, "pre-allocate" a specified block of analog channels to commercial broadcasters are fundamentally at odds with the Commission's video dialtone policy framework. NYNEX, for example, has proposed that all but one of its 21 analog channels be given over to local broadcast stations.[24] Under its proposal, subscribers could receive these analog channels without the use of a set-top box, giving analog programmers a distinct marketing advantage over digital programmers.[25] The NYNEX proposal would discriminate against The Cartoon Channel, Encore, TV Food Network and all other cable satellite networks by excluding them from competing for carriage on the channels set aside for local broadcasters. The entire thrust of the Commission's video dialtone policy, however, is that Nickelodeon, Bravo and other cable networks have just as much a right to analog capacity and favored channel positioning as does the local Fox affiliate.

Fidelity to the principle of nondiscrimination requires that analog channels be made available to all programmer-customers through an open enrollment process. If during the initial open enrollment period, it becomes evident that the demand for analog channel capacity exceeds

---

[23] See MCI Telecommunications Corp. v. FCC, 627 F.2d 322, 342 (D.C. Cir. 1980) (barring common carriers from discriminating among "early and late customers" in a manner that would prefer early users over "later potential users").

[24] New England Telephone and Telegraph Company Application, W-P-C 6983, filed July 8, 1994, at 4 ("NYNEX Application"). The remaining analog channel would be used for a NYNEX Level 1 Gateway Directory.

[25] Id., Exhibit A at 2.

the supply, the Commission has indicated that the LEC must demonstrate why it is technically infeasible and economically unreasonable to expand analog capacity to meet that demand:

> We will address claims by LECs that expansion is not technically feasible and economically reasonable on a case-by-case basis in light of all relevant circumstances. In this review process, we will look to all relevant information and data, including the capacity offered on other video dialtone systems, data relating to demand for video delivery in the LEC's region or in comparable regions, and technical data...To the extent a LEC concludes that expansion is not technically feasible or economically reasonable at that time, the LEC must explain in detail the basis for its determination and indicate when it anticipates expansion would be technically feasible and economically reasonable.[26/]

Consistent with the Commission's intent, a LEC's initial offering of video dialtone service should be deferred until resolution of the capacity shortfall issue, in order to prevent discrimination against programmer-customers unable to obtain capacity during the pendency of the inquiry.[27/] A company should be barred from favoring any programmer while sufficient capacity is unavailable, for example, by granting favored access to limited analog capacity where digital capacity is either unavailable or more burdensome for consumers to access.

If, after the capacity expansion inquiry, the Commission determines that technical considerations temporarily prevent a LEC from supplying sufficient analog capacity to meet demand,[28/] such capacity should be allocated in a thoroughly non-discriminatory manner. The

---

[26/] Reconsideration Order at ¶ 38. See also Atlantic Coast Line R.R. v. Wharton, 207 U.S. 328, 335 (1907); New York ex rel. Woodhaven Gas Light Co. v. Public Serv. Comm'n, 269 U.S. 244, 248 (1925).

[27/] See supra at n.23.

[28/] As suggested in the Reconsideration Order, careful scrutiny of such claims by the Commission -- including conducting surveys of other video dialtone providers, programmers, and technical experts -- is critical. US West, for example, has suggested that it will never be technically feasible or economically reasonable to offer analog capacity in any manner other than that which is proposed in its Section 214 application. See U S West Communications, Inc., File (continued...)

LECs should be barred from having any involvement, direct or indirect, in this neutral allocation process. Moreover, if demand for analog capacity continues to exceed supply, and the telephone company refuses to take meaningful action to expand capacity, it should be held in violation of the Commission's video dialtone rules.

In short, adherence to the principle of nondiscrimination requires the Commission to scrutinize closely LEC assertions of capacity -- analog or digital -- shortfalls. LECs should not be permitted to allow some programmer-customers to distribute services while sufficient capacity is unavailable for other programmer-customers, in order to preserve the primacy of the nondiscrimination principle. In the event that capacity is limited, the LECs must be prevented from entering into any agreements allocating analog channel positions prior to the general offerings of such capacity to all interested programmer-customers. Of course, if the telcos wish to engage in editorial functions, they must proceed under Title VI.

28/ (...continued)
No. W-P-C 6868, Amendment and Request for Modification (Aug. 5, 1994) at 3-4; see also id. at Attachment A (Letter of April 26, 1994 from Lawrence E. Sarjeant to A. Richard Metzger) ("Simply stated, in order to expand channel capacity, the Omaha architecture would have to be reengineered at great expense and the loss of digital capacity . . . [i]n interpreting the expectation that USWC will expand analog capacity, the Commission can, and should, focus on expanding participation by providers in the trial rather than on the expansion of analog channels.") Given the critical importance of the expandability concept to the Commission's overall policy framework, a LEC's obligation to supply and expand capacity must be viewed as an iterative -- rather than static -- process.

B. TELCO-MANAGED CHANNEL SHARING ARRANGEMENTS ARE UNNECESSARY AND CONTRARY TO THE COMMISSION'S VIDEO DIALTONE POLICY FRAMEWORK

1. CHANNEL SHARING ARRANGEMENTS AMONG PROGRAMMER-CUSTOMERS SHOULD BE PERMITTED

The Commission has solicited comment on the use of so-called "channel sharing arrangements" as a means of addressing capacity shortages. The stated purpose of such arrangements is to "maximize use of analog capacity by avoiding carriage of the same video programming on more than one analog channel."[29/] As described by the Commission, these arrangements would make available to all programmer-customers a pool of common channels which could be made part of their service offering. The Commission believes that these arrangements "can offer significant benefits to consumers, programmer-customers, and video dialtone providers . . . ."[30/]

The Commission's inclination to establish a channel sharing policy risks placing the cart before the horse. Channel sharing mechanisms may well prove to be an efficient distribution arrangement for programmer-customers. Clearly, however, the best way to determine the utility of such arrangements is to allow the market to decide the matter. These "market-based" channel sharing arrangements would permit programmers to decide for themselves about the costs and benefits of such mechanisms. If, however, rules and policies governing such mechanisms are established prematurely, the Commission may create artificial incentives for programmer-customers to enter into sub-optimal arrangements the shortcomings of which were

---

29/ Third Notice at ¶ 271.

30/ Id. at ¶ 274.

not immediately apparent due to the incipiency and nature of video dialtone service. Relying on the programmers themselves to determine whether or not to forge common channel or packaging arrangements best prevents discrimination against those programmer-customers who choose to offer their service on an individualized basis.

Most importantly, however, market-based channel sharing mechanisms avoid the discrimination inherent in the specific proposals noted in the Third Notice. Those proposals -- which are predicated upon some form of telco involvement -- would contravene the common carriage principles underlying the Commission's video dialtone arrangements and resurrect the risks of discrimination that prompted the rejection of the telephone companies' anchor programmer proposals.

2. THE COMMISSION'S VIDEO DIALTONE POLICY FRAMEWORK BARS THE ESTABLISHMENT OF CHANNEL SHARING ARRANGEMENTS AMONG PROGRAMMER-CUSTOMERS THAT ARE DEVELOPED WITH ANY DIRECT OR INDIRECT TELCO INVOLVEMENT

The LEC channel sharing proposals referenced by the Commission contravene the core of the Commission's video dialtone policies by effectively authorizing them to create a class of programmers with first rights to analog capacity. Thus, the telephone companies' assertion that shared channels "will most likely carry off-air broadcast signals because . . . those are the most popular channels with consumers"[31/] amounts to nothing more than self-fulfilling prophecy. The nondiscrimination principle will be rendered stillborn if video common carriage providers can make channel allocation decisions on the basis of putative service popularity before any

---

31/ Third Notice at ¶ 272 (emphasis added).

programming has even been offered to the public. Local broadcast stations have no greater right to analog capacity or inclusion in a shared channel arrangement than does TNT or USA.

The indifferent provision of transmission service requires that no provider of video programming be given an advantage over any other in obtaining access to the basic platform. Proposals to create channel sharing arrangements that grant direct or indirect advantages to classes of programmers are the antithesis of non-discriminatory access to the basic platform. The telephone companies' intention to market these common channels as a gateway to other video programming services offered on the platform would disadvantage programmers involuntarily excluded from the arrangement. These arrangements would in no way conserve the supply of capacity for programmers that are excluded from them. If common channels are only available to a certain pre-selected class of programmers, then the amount of capacity available to all other programmers is diminished and not conserved.

While the telephone companies do not characterize their proposed channel-sharing arrangements as the creation of an anchor programmer, any such arrangement undertaken with direct or indirect LEC involvement amounts to the same thing: the packaging of core programming at the behest of the telephone company.[32/] Proposals that a "manager" or "administrator" or "facilitator" selected with direct or indirect telco input "assist"[33/] in the

---

32/ Not surprisingly, Pacific Bell's application proposes that the platform's shared channels would be administered by an entity affiliated with its proposed anchor programmer. See supra at n.14.

33/ Third Notice at ¶ 273.

formation of common channel arrangements represent little more than the not-so-invisible hand of the telephone companies themselves.[34/]

It is also evident that the channel sharing arrangements represent an effort by the telephone companies to replicate the basic service tier offerings provided by cable operators. If, as expected, common channels directly or indirectly selected by the LECs are marketed in a manner akin to basic service,[35/] then the telcos would be unlawfully involved in the bundling, tiering and packaging of programming. Thus, LEC involvement in channel sharing arrangements not only would needlessly engender risks of discrimination, it also would run afoul of the legal framework for video dialtone.[36/] The establishment of a special relationship

---

[34/] Contrary to the Commission's suggestion, there is absolutely no need for it "to modify [the] rule prohibiting video programmers from jointly operating, with a LEC, a basic video dialtone platform" in order to enable channel sharing arrangements to develop. Id. at ¶ 275. Market-based channel sharing arrangements among programmer-customers can be developed and implemented within the Level 1 framework of the carrier-user relationship.

[35/] See, e.g., NYNEX Application at 7 & n.11; Application of Pacific Bell, W-P-C 6913, December 20, 1993 at 17-19. Pacific Bell's application seeks authorization to have 10-15 of its analog channels utilized as "Standard Service Channels" that "will carry off-air video programming." Id. at 17. The application states that "Pacific Bell will design its pricing of the Standard Service Channels to the Administering customer-programmer to facilitate the widest possible availability of the core set of services...." Id. at 18. The application then states flatly that the Standard Service Channels are "[s]imilar in concept to the Basic Service Tier described by the Cable Act." Id. at n.22. Pacific Bell believes that such channels "expand opportunities for entrepreneurial video programmers by providing them with the ability to offer specialized programs along with off-air programming needed to attract viewers." Id. at 18. In fact, there may be any number of "entrepreneurial video programmers" who do not need to bundle their programming with shared channels in order to attract viewers, but who would have fewer analog channels available to them as a result of this proposal. Moreover, it is equally likely that both competition and diversity among service offerings would be diminished due to pressure on other programmers to tie their offerings to the shared channels.

[36/] Video Dialtone Order, 7 FCC Rcd at 5789 (telcos may not "select video programming by determining how programming is presented for sale to consumers, including making decisions concerning the bundling or 'tiering,' or the price, terms and conditions of video programming offered to consumers . . .").

between a telephone company and another entity to provide a package of programming services to subscribers that is developed in accordance with eligibility criteria delineated by the LEC clearly constitutes the offering of cable service rather than video dialtone service.[37] The D.C. Circuit's decision affirming that video dialtone service lies outside the reach of Title VI was premised on the finding that the telco was providing a basic common carrier platform to all programmers on a nondiscriminatory basis:

> [V]ideo dialtone is a common carriage service, the essence of which is an obligation to provide service indifferently to all comers--here, to provide service to all would-be video programmers...[38]

All would-be video programmers are not treated equally if only some are able to join a distribution arrangement directly or indirectly administered or facilitated by the telephone company. There are no market, policy or legal considerations that counsel or permit telephone company involvement in the development and management of shared-channel arrangements. The Commission should adhere both to market-based principles and to the principles underlying its video dialtone policies and allow such arrangements to develop among programmer-customers without government involvement.

---

[37] See id.

[38] NCTA v. FCC, 33 F.3d at 75. Indeed, the channel-sharing proposals referenced in the Third Notice even violate the Commission's expansive reading of permissible Level 2 activities. See Video Dialtone Order, 7 FCC Rcd at 5818, n.180. While authorizing telcos at Level 2 to "encourage video programmers...to participate in...video gateways," the Commission unequivocally reaffirmed that "telephone companies will have no ability to select which programming services will have access to the basic platform." Id. Clearly, the channel-sharing arrangements referenced in the Third Notice involve the telcos in both recruitment and selection of programmers, which is barred by the Commission's policy framework.

II. THE COMMISSION MAY NEITHER PERMIT NOR MANDATE THE GRANT OF PREFERENCES BY VIDEO COMMON CARRIERS TO PROGRAMMER-CUSTOMERS

A. PREFERENTIAL ACCESS TO THE VIDEO PLATFORM IS UNLAWFUL AND CONTRARY TO PUBLIC POLICY

Whether expressly authorized -- or merely permitted -- by the Commission, preferential access to the video platform is prohibited by statute and contrary to public policy. The Commission has repeatedly stressed that both the lawfulness and the public interest character of its video dialtone policies depend upon their conformance to the common carrier framework established in the Communications Act.[39/]

The essence of a telephone company's duty to offer common carriage is "an obligation to provide service indifferently to all comers...".[40/] This statutory obligation simply cannot be reconciled with a policy or practice of granting preferential conditions or rates to similarly situated video dialtone programmer-customers. There is no principled basis for concluding that commercial broadcast stations (a substantial number of which are owned or affiliated with multi-billion dollar conglomerates), or public broadcast stations (many of which have substantial endowments and benefit from taxpayer subsidies) are entitled to a more preferred status on a

---

[39/] Video Dialtone Order, 7 FCC Rcd at 5786-87 (Cable Act forbids telephone companies from "providing any video service other than on a common carrier basis"); Id. at 5797 ("common carrier platform is critical to our determination that video dialtone is in the public interest"); Reconsideration Order at ¶ 31 ("common carrier regulatory model...was critical to our determination that video dialtone is in the public interest").

[40/] NCTA v. FCC, 33 F. 3d at 75; see also National Ass'n of Regulatory Utility Commissioners v. FCC, 525 F.2d 630, 641 (D.C. Cir. 1976)("to be a common carrier one must hold oneself out indiscriminately to the clientele one is suited to serve").

putatively common carrier platform than is C-SPAN, CNN, or a fledgling niche cable network still struggling to earn a profit.

Bell Atlantic's "will carry" proposal -- which would provide free carriage on analog channels for local broadcast stations and PEG programmers -- provides the most blatant example of the inequities inherent in granting preferential access and rates to a limited class of programmers. Free distribution of local broadcast stations on analog channels (on a platform with limited analog capacity) will create a preferred class of program providers and significantly impede the ability of unaffiliated programmer-customers to compete effectively.[41] It is particularly inappropriate for telephone companies to arrogate to themselves the power to decide that local broadcasting and access programming deserves preferential treatment and that all other programmer-customers and end users should bear the costs of delivering this preferred programming.[42]

The grant of preferential access, rates or conditions by a LEC to commercial broadcasters or non-profit programmers -- whether voluntarily or pursuant to Commission policy -- implicates the telephone companies in a determination as to "how programming is presented for sale to consumers" and involves them in a decision regarding "the price, terms and conditions of video

---

[41] Application of Bell Atlantic, W-P-C 6966, at 4-5 (June 16, 1994).

[42] Not content with denying cable programmers access to a significant portion of analog capacity that is only available to broadcasters, Bell Atlantic's application also provides that the remaining analog channels are only available in packages that contain 20 digital channels for each analog channel. The forced bundling of analog and digital channels in such a disproportionate ratio is patently unfair and discriminatory. Indeed, it seems especially designed to discourage small programmers and new services from seeking capacity on the network in an individualized manner.

programming offered to consumers."[43] Under the Commission's video dialtone policy framework -- and the D.C. Circuit's decision in NCTA v. FCC -- countenancing such actions would bring the video dialtone within the ambit of Title VI. If the telcos wish to depart from the principle of nondiscrimination, they are obligated to comply with the provisions of Title VI.

Nor can a Commission decision to impose, or acquiesce to, preferential terms or conditions for certain programmers be reconciled with the provisions of Title II of the Communications Act. Section 201(b) of the Act[44] permits a carrier to impose separate classifications only "where differences in service attributes are clearly shown."[45] In this instance, the Commission already has dictated that telcos offering video dialtone "make available to all service providers the same service offerings and functionalities on the same terms and conditions,"[46] thereby vitiating the need for any further inquiry as to whether there are any distinctive attributes differentiating the offering of service to commercial broadcaster programmer-customers and cable network programmer-customers that would necessitate differential treatment.[47]

---

[43] Video Dialtone Order at 5789.

[44] 47 U.S.C. § 201(b) provides that "All charges, practices, classifications, and regulations for and in connection with such communication, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful."

[45] See In the Matter of Alascom, Inc., 64 R.R. 2d 1151, 1152 (1984).

[46] Video Dialtone Order, 7 FCC Rcd. at 5810-11 (emphasis added).

[47] Section 201(b) does provide that "communications by wire or radio subject to this Act may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of communications...." However, even where (continued...)

Similarly, Section 202(a) prohibits common carriers from establishing discriminatory rates, practices or classifications, or from subjecting any class of customers to any "undue or unreasonable prejudice or disadvantage." Section 202(a) clearly bars a telco providing video transmission capacity from granting preferential access or rates to one class of users (over-the-air broadcasters), while denying such preferences to another class of users (cable satellite networks).[48/] The type of preferences sought by commercial broadcasters and non-profit programmers are simply inconsistent with the obligations of a common carrier under Title II.

Finally, the establishment of such preferences would contravene the nondiscrimination principle underlying the Commission's video dialtone policy. Permitting a telephone company to voluntarily provide such preferences based upon its own criteria would be antithetical to this

---

[47/] (...continued)
the Commission is expressly authorized to permit a separate classification under Section 201(b), the beneficiary of that statutorily authorized classification stills bears the burden of demonstrating its necessity in particular instances. See Copley Press, Inc. v. FCC, 444 F.2d 984, 988-89 (D.C. Cir. 1971) (press users seeking advantageous commercial rates must demonstrate that absent separate classification some users "will be forced to discontinue their wire services or that . . . a substantial number of customers will cancel their subscriptions" due to increased costs); see also In the Matter of World Press Freedom Committee, 51 RR 2d 34, 35 (1982) (denying preferential rates for press users because petitioner "made no showing at all that current outbound rates . . . 'significantly impair the widespread dissemination of news information'").

In the instant case, there is no express statutory authorization under Section 201(b) for the type of preference proposed in the Third Notice. Nor has there been any showing that differential treatment of commercial broadcasters or non-profit programmers is necessary to ensure their continued economic survival.

[48/] See, e.g., American Broadcasting Cos. v. FCC, 663 F.2d 133, 139 (D.C. Cir. 1980); American Trucking Ass'ns, Inc. v. FCC, 377 F.2d 121, 130 (D.C. Cir.), cert. denied 386 U.S. 943 (1966) ("The prohibition against different charges to different customers for like services under like circumstances is flat and unqualified. The pertinent section of the statute bristles with 'any.' It is made unlawful for 'any' carrier to make 'any' unjust discrimination by 'any' means, or to make 'any' undue preference to 'any' particular person, or to subject 'any' person to 'any' undue prejudice.").